82-1491

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES DYRAL BRILEY,
Petitioner,

v.

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA

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QUESTIONS PRESENTED

1. In the punishment phase of a capital murder trial, are sentencing instructions which merely repeat the bare words of the "aggravating circumstances" provision in the death penalty statute, and omit any explanation of "mitigating circumstances," sufficient to provide the "clear and objective standards" and "specific and detailed guidance" which are necessary to channel the discretion of the jury? *See Godfrey* v. *Georgia; Lockett* v. *Ohio.*

2. Is evidence obtained when the police continue to question the accused *after* he has requested an attorney admissible in a capital murder trial? *See Edwards* v. *Arizona.*

3. Should prospective jurors who are uncertain whether they will vote for or against the death penalty be excluded from the jury in a capital murder trial? *See Witherspoon* v. *Illinois.*

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA

Petitioner, James Dyral Briley, an inmate on Virginia's death row, respectfully prays that a writ of certiorari issue to review the judgment of the Virginia Supreme Court, which affirmed the denial of his state habeas corpus petition. The petitioner challenges here the validity of a death sentence imposed by a basically uninstructed jury. He also presents two errors so patent as to justify summary reversal.

OPINIONS BELOW

The unpublished opinion and order of the Virginia Supreme Court rejecting petitioner's appeal is attached as Appendix A. The unpublished opinions and orders of the Circuit Court of the City of Richmond dismissing the petition for writ of habeas corpus are attached as Appendix B.

JURISDICTION

The judgment and opinion of the Virginia Supreme Court is dated December 9, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides, in relevant part:

> "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . ."

the Sixth Amendment to the Constitution of the United States, which provides, in relevant part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

and the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the Virginia death penalty statute, Virginia Code §§ 19.2-264.2 - 19.2-264.5, which is attached as Appendix C.

STATEMENT OF THE CASE

Petitioner was convicted of two capital and eight noncapital felonies on January 25, 1980, following a jury trial in the Circuit Court for the City of Richmond. The

jury was selected by excluding for cause two prospective jurors who were uncertain whether they would or would not vote for the death penalty.

The testimony against petitioner was obtained principally from a 16-year-old youth who testified pursuant to a plea bargain after confessing to the murder of one of the victims. The youth, who stated at the trial that he had lied in certain of his earlier accounts of the crime, was the only witness who purported to describe what happened inside the house where the crimes took place, and link petitioner to the crimes. Other evidence introduced against petitioner included a statement he had given on the night of his arrest in response to police questioning which took place after he had requested an attorney.

After a brief sentencing proceeding, at which petitioner's court-appointed attorneys presented only one witness, and at which the court's sentencing instructions consisted essentially of a reading of a portion of the Virginia death penalty statute and the verdict forms, the jury recommended the death penalty.

On appeal, the Virginia Supreme Court affirmed the convictions and sentences. 221 Va. 563, 273 S.E.2d 57 (1980). Appointed trial counsel failed to seek certiorari from this Court and initially failed to pursue state or federal habeas corpus remedies.

On March 5, 1981 petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia, raising four claims. On March 13, 1981, that court denied the petition and also denied a stay of execution. On March 16, 1981, petitioner appealed to the United States Court of Appeals for the Fourth Circuit, and on March 17, 1982, the Court of Appeals stayed execution and the federal proceeding while petitioner exhausted his state habeas corpus remedies.

Petitioner then filed a petition for writ of habeas corpus in state court. All but two of the asserted grounds for

relief were dismissed without a hearing. The remaining two counts, concerning ineffective assistance of counsel and the admissibility of a statement obtained from petitioner on the night of his arrest, were rejected after an evidentiary hearing. A petition for appeal to the Virginia Supreme Court was denied on December 9, 1982.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The inadequacy of the sentencing instructions was raised by petitioner both on direct appeal and in the habeas corpus proceeding below. On direct appeal, petitioner relied on *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), and argued that "the [trial] Court, by merely quoting the statutory language both orally and in writing and by failing to set forth clear guidelines as to the meaning of those phrases, allowed an unconstitutional application of the statute by the jury." Petitioner's Brief at 38-39. The Virginia Supreme Court expressly rejected the argument, stating, " 'While the terms may have been defined in an instruction to the jury, in a manner satisfactory to this Court, the fact that the trial court did not choose to give such a definitional instruction does not constitute reversible error.' " 221 Va. 563, 579-80, 273 S.E.2d 57, 67.[1]

The habeas petition challenged the instructions, Amended Petition at 17-18, and the habeas court dismissed the claim without a hearing both on the merits and on the ground that it should have been raised at trial or on direct appeal. Opinion Letter of October 2, 1981,

[1] In addition, as part of Virginia's death penalty scheme, Virginia Code § 17-110.1(c) requires the state supreme court to review all aspects of the sentencing phase, regardless of whether they were raised at trial or enumerated on appeal, "to determine . . . [w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor . . . ." Thus, the Virginia Supreme Court was necessarily charged with review of the adequacy of the sentencing instructions.

Opinion and Order of October 29, 1981, Appendix B hereto. This dismissal was challenged in the petition for appeal to the Virginia Supreme Court, Petition for Appeal at 39-42, and the Virginia Supreme Court affirmed the habeas court. Opinion and Order of December 9, 1982, Appendix A hereto.

2. Petitioner's *Miranda* claim was not raised on direct appeal, but was raised in the state habeas proceeding. Amended Petition at 33-34. The habeas court rejected the Commonwealth's argument that the claim was waived, ordered an evidentiary hearing, and ruled on the merits of this claim. Opinion and Order of January 29, 1982, Appendix B hereto. Petitioner briefed the claim in his petition for appeal to the Virginia Supreme Court, Petition for Appeal at 14-18, and the Virginia Supreme Court affirmed the ruling of the habeas court. Opinion and Order of December 9, 1982, Appendix A hereto.

3. Petitioner's *Witherspoon* claim was not raised at trial or on direct appeal, but was not thereby waived. *Wigglesworth* v. *Ohio*, 403 U.S. 947 (1971); *Harris* v. *Texas*, 403 U.S. 947 (1971). It was raised in the habeas proceeding, Amended Petition at 18-19, and was dismissed by the habeas court without a hearing both on the merits and on the ground that it should have been raised at trial or on appeal. Opinion Letter of October 2, 1981, Opinion and Order of October 29, 1981, Appendix B hereto. The petitioner challenged this ruling in his petition for appeal to the Virginia Supreme Court, Petition for Appeal at 39-42, and the Virginia Supreme Court affirmed the habeas court. Opinion and Order of December 9, 1982, Appendix A hereto.

REASONS FOR GRANTING THE WRIT

1. In *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980), this Court held that, in a capital murder case, the jury's sentencing discretion must be channeled "by 'clear and objective standards' that provide 'specific and detailed guidance.'" Where the jury is left "basically unin-

structed," *id.* at 429, the jury's death sentence cannot stand.

In *Lockett* v. *Ohio*, 438 U.S. 586 (1978), the Court held that a sentencing jury may not be precluded from considering, as a mitigating factor, any relevant aspect of the defendant's character or the circumstances of the crime. Limitations on the jury's consideration of mitigating factors create an "unacceptable" "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S. at 605.

Godfrey and *Lockett* notwithstanding, the state courts and the lower federal courts are in considerable disarray on the question of how much guidance is constitutionally necessary for death sentencing juries. In this case, the instructions consisted of little more than a reading of a portion of the statute and the verdict forms. Other states similarly ignore *Godfrey* and *Lockett* and provide no clarifying or limiting instructions in the application of their death sentencing statutes. Other courts, however, require more detailed and careful instructions to guide juries, although the specific requirements vary widely from state to state, and from circuit to circuit.

The death penalty is now being imposed in more and more cases. The writ should be granted because trial courts need guidance on the instructions they must deliver to assure that, in cases where the stakes are highest, "juries [are] carefully and adequately guided in their deliberations." *Gregg* v. *Georgia*, 428 U.S. 153, 193 (1976).

2. Two errors at petitioner's trial are so plain on the record as to justify granting the writ for the purpose of summary reversal. The first concerns the admission of a statement which the police obtained by questioning the petitioner on the night of his arrest after he had requested an attorney. The second concerns the exclusion of prospective jurors who expressed uncertainty as to whether they would impose the death penalty.

I. THE COURT SHOULD CLARIFY THE SENTENCING INSTRUCTIONS REQUIRED IN CAPITAL CASES

A. The State and Federal Courts Are in Disarray

As the plurality emphasized in *Gregg* v. *Georgia*, careful and adequate instructions are necessary in order to channel a sentencing jury's discretion:

> "Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law .... It is quite simply a hallmark of our legal system that juries be careful and adequately guided in their deliberations." 428 U.S. at 192 (citations and footnote omitted).

Presuming that courts would give adequate guidance to death-sentencing juries, the Court in *Gregg* and *Proffitt* v. *Florida*, 428 U.S. 242 (1976), upheld as facially valid death penalty statutes that otherwise might have been unconstitutionally vague and overbroad. However, where this presumption did not hold and the jury was left "basically uninstructed," the Court has not hesitated to strike down the death sentence. *Godfrey* v. *Georgia*, 446 U.S. 420 (1980).

As we demonstrate below, the Virginia courts, in applying a death statute similar to Georgia's, have failed to provide the "careful instructions on the law and how to apply it," 428 U.S. at 193, that *Gregg* presumed. Other state courts and the federal courts have come to widely varying conclusions as to the extent to which a death-sentencing jury must be guided in its deliberations.

Some states have held that juries must be informed of the constitutional limitations on their application of "aggravating circumstances" provisions in death penalty

statutes.[2] Other states, however, have joined Virginia in concluding that instructions explaining "aggravating circumstances" provisions are not necessary.[3]

Some state and federal courts have also required detailed instructions on the function of "mitigating circumstances" and the jury's option to recommend against the death penalty even if "aggravating circumstances" are found. In *Spivey* v. *Zant*, 661 F.2d 464, 471 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 3495 (1982), for example, the Fifth Circuit, relying on *Gregg* and *Lockett*, held that jury instructions must not only "not preclude consideration of mitigating factors [but must] also 'guid[e] and focu[s] the jury's objective consideration'" of such factors. *Accord*, *Goodwin* v. *Balkcom*, 684 F.2d 794, 801-02 (11th Cir. 1982). Similarly, the North Carolina Supreme Court has concluded that specific mention of "mitigating circumstances" and a full explanation of their signifi-

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[2] *State* v. *Johnson*, 298 N.C. 47, 257 S.E.2d 597, 610, 620-22 (1979) ("[t]horough jury instructions, which incorporate and reflect the definitions accorded to these criteria . . . must be given"); *Burrows* v. *State*, 640 P.2d 533, 542-45 (Okla. Crim. App. 1982) (jury instructed on definition of "heinous, atrocious and cruel"). *See also State* v. *Moore*, 614 S.W.2d 348, 351 (Tenn.), *cert. denied*, 454 U.S. 970 (1981) (instructions must include statutory definition of any felony relied upon as "aggravating circumstance").

[3] *See, e.g., State* v. *Newlon*, 627 S.W.2d 606 (Mo.) (*en banc*), *cert. denied*, 51 U.S.L.W. 3249 (Oct. 4, 1982) (definition of the term "depravity of mind" unnecessary with respect to an "aggravating circumstance" provision similar to § (b)(7) in the Georgia statute); *Washington* v. *State*, 361 So. 2d 61, 65-66 (Miss. 1978), *cert. denied*, 441 U.S. 916 (1979) (jury does not need definition of "especially heinous, atrocious or cruel"); *Krier* v. *State*, 249 Ga. 80, 287 S.E.2d 531, 535-36, *cert. denied*, 102 S. Ct. 2974 (1982) (definitional guidelines not necessary for "aggravating circumstance" provision). *See also King* v. *State*, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1088 (1978) (no definitions necessary for application of phrase "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

cance are required in a trial court's instruction, *State* v. *Johnson*, 298 N.C. 47, 257 S.E.2d 597, 614 (1979), and other states have concluded that at least some explanatory instructions are necessary.[4] Several other states, however, have held that the jury need not be instructed in the meaning or significance of "mitigating circumstances."[5] Still other states, while indicating general dissatisfaction with the level of guidance afforded juries, have left it to the trial courts to devise adequate instructions. For example, in remanding one case, the Wyoming Supreme Court, without further discussion, merely stated that the jury should "have the statutory language more thoroughly explained to it." *Hopkinson* v. *State*, 632 P.2d 79, 166 (Wyo. 1981), *cert. denied*, 455 U.S. 922 (1982).

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[4] *State* v. *English*, 367 So. 2d 815, 819 (La. 1979) (instruction necessary to explain "mitigating circumstance" of diminished capacity); *Beck* v. *State*, 396 So. 2d 645, 663 (Ala. 1980) (court shall instruct the jury that they must weigh the "aggravating" and "mitigating" circumstances); *Houston* v. *State*, 593 S.W.2d 267, 276 n.2 (Tenn. 1980) (statute requires judge to instruct jury to weigh and consider "mitigating" and "aggravating" circumstances); *Burrows* v. *State*, 640 P.2d 533, 542-45 (Okla. Crim. App. 1982) (jury advised of availability of life imprisonment and instructed that they should consider any "mitigating circumstances" they find applicable and weigh them against the "aggravating circumstances"); *State* v. *Wood*, 648 P.2d 71, 83 (Utah), *cert. denied*, 103 S. Ct. 341 (1982) (prescribing detailed instruction on consideration and weighing of "mitigating" and "aggravating" circumstances). *See also Washington* v. *State*, 361 So. 2d 61, 64-65 (Miss. 1978), *cert. denied*, 441 U.S. 916 (1979) (approving instruction to jury that they must find one or more "aggravating circumstances" beyond a reasonable doubt, and then must consider the "mitigating circumstances" and whether they outweigh the "aggravating circumstances").

[5] *Redd* v. *State*, 242 Ga. 876, 252 S.E.2d 383, 388, *cert. denied*, 442 U.S. 934 (1979) ("mitigating circumstances" need not be singled out in court's charge to jury); *Quinones* v. *State*, 592 S.W.2d 933, 947 (Tex. Crim. App.) (*en banc*), *cert. denied*, 449 U.S. 893 (1980) (no explanatory instructions necessary concerning jury's consideration and weighing of "mitigating circumstances").

We live amidst a capital punishment revival. In the 10-year period 1961-1970, death sentences were imposed on an average of 106 people each year; in the 6-year period 1975-1980, the yearly average had doubled to 216 death sentences. Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930-1970, p. 9 (Aug. 1971); J. Greenberg, *Capital Punishment as a System*, 91 Yale L. J. 908, 936 (1982). In a criminal proceeding where the stakes could not be higher, it is essential that clear and complete instructions be given the jury on the manner in which the death sentence can and cannot be imposed constitutionally. Some courts are now giving these instructions; others, including, we submit, the trial court below, are not. We urge that the writ be granted to bring constitutionality and consistency to that criminal proceeding where constitutionality and consistency are most needed.

B. The Jury Was Unconstitutionally Instructed on the Aggravating Circumstances Necessary for the Death Penalty

The charge to the jury which sentenced James Briley to death is set forth in full in Appendix D. It consists essentially of a reading of selected portions of the Virginia death penalty statute and the verdict forms supplied to the jury.[6]

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[6] The "aggravating circumstances" provision in the Virginia death penalty statute, which was read to the jury, provides:

> "The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Code § 19.2-264.4(C).

On the application of the second of the two "aggravating circumstances" in the Virginia statute, the jury was instructed as follows:

> "Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt . . . that his conduct in committing the offense was outrageous and wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." 3 Trial Record at 129 (hereafter cited as TR).

This is essentially the language of the statute. No guidance was given to the jury as to the meaning or application of this provision. The jury was also denied any instruction on the meaning or application of the first "aggravating circumstance" provision, which directs the jury to consider the future dangerousness of the accused. The jury found both "aggravating circumstances" and fixed the penalty at death.

The "instruction" on the "outrageous and wantonly vile" standard given to the petitioner's jury is virtually identical to the one disapproved by this Court in *Godfrey* v. *Georgia*, where an identical "aggravating circumstance" provision was in issue.

In *Godfrey*, the Court considered the application of Georgia Code § 27-2534.1(b)(7) (1978), which provides that the jury may impose the death sentence if it finds that

> "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The Court had previously recognized that this provision was so broad that conceivably it could apply to any murder. *Gregg* v. *Georgia*, 428 U.S. at 201. "But," the Court had concluded, "this language need not be construed in

this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Id.* Accordingly, in *Gregg* the Court rejected the argument that such a provision would allow juries to impose the death penalty arbitrarily and capriciously.[7]

In *Godfrey*, however, the trial court instructed the jury merely by reading the language of section (b)(7), without explanation or definition. The jury then found that the offense was "outrageously or wantonly vile, horrible and inhuman" and imposed the death sentence. This Court vacated the death sentence, finding that the jury was "basically uninstructed." 446 U.S. at 429. The Court stated:

> "There is nothing in these few words ['outrageously or wantonly vile, horrible and inhuman'] standing alone that implies any inherent restraint on the arbitrary and capricious infliction of the death penalty. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." 446 U.S. at 428-29.

The plurality in *Godfrey* went on to hold that there was insufficient evidence to support the jury's finding of the

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[7] Similarly, in *Proffitt* v. *Florida*, 428 U.S. 242, 255 (1976), in considering a similar "aggravating circumstance" in the Florida death statute, the Court concluded that the provision, as construed by the Florida Supreme Court, was not vague or overbroad: "We cannot say that the provision, *as so construed*, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." (Emphasis supplied.)

aggravating circumstance and that the Georgia Supreme Court had failed to perform an adequate review of the death sentence. It is clear, however, that the inadequate instruction stands as an independent ground for reversal. The plurality stated that "[t]he standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured . . . by the Georgia Supreme Court." 446 U.S. at 429.[8]

The instructions here were virtually identical to those rejected in *Godfrey*.[9] The Virginia Supreme Court has adopted a limiting construction of its "outrageous and wantonly vile" standard, *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978), but on petitioner's direct appeal, the Virginia Supreme Court held that a death-sentencing jury need not be informed of this limiting construction. 221 Va. 563, 579-80, 273 S.E.2d 57, 67 (1980). This ruling is fundamentally at odds with both *Gregg* and *Godfrey*. Where the jury is the sentencing authority, it is "unthinkable" that it should not be informed of the limitations which control its discretion. *Gregg*, 428 U.S. at 193.

The writ should be granted to make clear to all courts that limiting constructions of a death statute provision must be disclosed to the jury.

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[8] Justices Marshall and Brennan agreed with the plurality and created a majority on this issue. 446 U.S. at 435 n.1, 437 (Marshall, J., concurring in judgment).

[9] The only difference between the instructions here and the "few words" in *Godfrey* is that here the phrase "beyond the minimum necessary to accomplish the act of murder" was added. These ten words do not transform this invitation to the jury to set its own standards into the "specific and detailed guidance" mandated by the Eighth and Fourteenth Amendments. They do not limit the open-ended possibilities of interpretation which the Court found improper in *Godfrey*.

C. The Jury Was Unconstitutionally Instructed on Mitigating Circumstances

In *Roberts* v. *Louisiana*, 428 U.S. 325 (1976) and *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), this Court held that a death sentencing scheme must afford "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Roberts*, 428 U.S. at 333-34. Subsequently, in *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978), the Court emphasized that the sentencer must not be precluded from "giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation."

Merely providing the jury with the relevant mitigating information "is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if the sentencing is performed by a jury." *Gregg*, 428 U.S. at 192. Clear jury instructions on mitigation are necessary. "Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg*, 428 U.S. at 192. The instructions should

> " 'point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.' . . . While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary." 428 U.S. at 193 (citation omitted) (emphasis in original).

Gregg and *Lockett* were ignored here. While the Virginia death penalty statute contains a "mitigating cir-

cumstances" provision, not even the bare words of this provision were read to the jury.[10]

Rather, the jury was instructed that it was required to return a sentence of death if one of the "aggravating circumstances" was found, regardless of mitigating factors. The trial judge instructed the jury:

> "If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two [aggravating circumstances] then *you shall fix the punishment of the defendant at death*; or if you believe from all the evidence that the death penalty is not justified you shall fix the punishment of the defendant at life inprisonment. If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment." 3 TR at 129-30 (emphasis added).

The jury could easily have understood this charge to mean that if it found an "aggravating circumstance" it had

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[10] The "mitigating circumstances" provision in Virginia's death penalty statute reads as follows:

> "In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any Rule of Court, shall not be admitted into evidence.
>
> Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense." Virginia Code § 19.2-264.4(B).

to impose the death sentence, regardless of mitigating factors. This is apparent from the use of obligatory language—"shall fix"—and from the "either/or" parallel construction of the first and last clauses. (The last clause correctly requires life imprisonment if no "aggravating circumstance" is found.)

Worse yet, petitioner's jury received no guidance on the application of "mitigating circumstances." The trial court's mitigation instructions consisted solely of one enigmatic comment that "if you believe from all the evidence that the death penalty is not justifed, then you shall fix the punishment of the defendant at life imprisonment," 3 TR at 130, and a reading of the verdict forms.[11] While the trial court did read the "aggravating circumstances" provision of the statute to the jury, it did not even read the "mitigating circumstances" provision. It provided no definition of "evidence in mitigation" or any instruction as to what role "mitigating circumstances" should play in the jury's death sentence deliberations.

Such instructions ignore the clear implications of *Lockett*, *Roberts* and *Woodson*.

* * * *

In short, the jury that sentenced James Briley to death heard a reading of a portion of the Virginia death sentence statute, but received no instruction from the trial court as to how that statute should be interpreted, or whether "mitigating circumstances" might be weighed against "aggravating circumstances." It was not even told what might constitute a "mitigating circumstance."

This is but one of many cases in which the teachings of this Court on death penalty instructions are being ignored.

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[11] The verdict forms recited the possible aggravating factors and then added: "and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death," or, in the alternative, "having considered all the evidence in aggravation and mitigation of such offense, fix his punishment at life imprisonment." 3 TR at 131.

II. SUMMARY REVERSAL IS REQUIRED BECAUSE A STATEMENT OBTAINED IN VIOLATION OF *MIRANDA* WAS ADMITTED IN EVIDENCE

In *Miranda* v. *Arizona*, 384 U.S. 436, 444-45 (1966), this Court established a bright-line rule: if an accused "indicates in any manner and at any state of the process that he wishes to consult with an attorney before speaking there can be no questioning." In *Fare* v. *Michael C.*, 442 U.S. 707, 719 (1979), the Court emphasized that *Miranda* created a "rigid rule that an accused's request for an attorney is a *per se* invocation of his Fifth Amendment rights requiring that all interrogation cease." This principle was most recently reaffirmed in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), where the Court stated that it is inconsistent with *Miranda* "for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." The refusal of the Virginia courts to apply this principle in the present case warrants summary reversal.

The relevant facts were established at the habeas hearing, largely through the testimony of the police officers who arrested and interrogated petitioner. Officer Gaudet testified that petitioner was arrested on October 22, 1979 at about 10:30 p.m. at a Richmond police station and immediately given his "*Miranda* warnings." Habeas Record 52 (hereafter cited as HR). At that time, according to Officer Woody, petitioner said to his brother, who was also being placed under arrest, "Don't say a . . . thing to anybody until you talk to a lawyer." HR 65. According to Officer Gaudet, petitioner did not talk about the crimes and was placed under guard in a room at the police station. HR 53.

Once in that room, petitioner testified, he requested an attorney, HR 72, and he was allowed to call one, Richard Ballard, Esquire. HR 73. Mr. Ballard testified that petitioner called him that night seeking representation, but he could not take the case. HR 101-02. In addition, Officer

Woody testified that when he was in the room, petitioner made a telephone call during which he said "that he was going to get his own attorney." HR 63-64.

No attorney was obtained for petitioner and he continued to be held under guard. At 11:45 p.m. on the same night, Officer Harding, according to his own testimony, entered the room where petitioner was being held, advised him again of his rights, and began an interrogation which resulted in a written statement by petitioner that was used as evidence against him at trial. HR 675-76; 2 TR 244-45. At no point had petitioner withdrawn his request for an attorney or initiated discussion of the crimes with the police.[12]

Miranda and *Edwards* were thus violated. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 473. Here the interrogation did not cease.

In responding to petitioner's claim below, the Commonwealth contended that petitioner was properly informed of his rights, that he understood them, and that his written statement was voluntary. Both the habeas court and the Virginia Supreme Court confined their analysis to such questions and ruled that the petitioner voluntarily and intelligently waived his Fifth and Sixth Amendment rights.[13] Both courts ignored petitioner's request for an attorney, thereby fundamentaly missing the point of *Edwards*:

> "[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to

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[12] At the habeas corpus hearing, petitioner testified that he wrote the statement "Because I got tired of them kept on questioning me." HR 82.

[13] See Opinion and Order, January 29, 1982 (Appendix B hereto); Opinion and Order, December 9, 1982 (Appendix A hereto).

> further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges or conversations with the police." 451 U.S. at 484-85.

A valid waiver of petitioner's right to counsel cannot be established by showing, as the Commonwealth admittedly did, that he responded to further police questioning, for all interrogation should have ceased following petitioner's request. *Edwards*, 451 U.S. at 484. *Miranda* requires that the right to counsel be invoked only once—thereafter, "it is the responsibility of those charged with [the accused's] custody to see to it that he obtains an attorney." *United States* v. *Hinckley*, 525 F. Supp. 1342, 1354 (D.D.C. 1981), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982). The resumption of interrogation by the police without an attorney present and the use at trial of the resulting statement violated petitioner's Fifth Amendment rights and requires reversal.

III. SUMMARY REVERSAL IS REQUIRED BECAUSE PROSPECTIVE JURORS WHO WERE UNCERTAIN WHETHER THEY WOULD IMPOSE THE DEATH PENALTY WERE EXCLUDED

"Unless a venireman states *unambiguously* that he would *automatically* vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." *Witherspoon* v. *Illinois*, 391 U.S. 510, 516 n.9 (1967); *Boulden* v. *Holman*, 394 U.S. 478, 482 (1969) (emphasis supplied). Exclusion under *Witherspoon* is proper only if the venireman's "irrevocable commitment" to vote against the death penalty regardless of the facts is "unmistakably clear." *Witherspoon*, 391 U.S. at 522 n.21.

Witherspoon was violated here because two prospective jurors, who were uncertain whether they would or would not vote to impose capital punishment, were excluded from the jury.[14]

Venireman Candies first stated that "I don't believe in" the death penalty,[15] 1 TR at 48, and then was examined as follows:

> "THE COURT: In other words, in any event, no matter what the evidence, you would not impose the death penalty?
> "MS. CANDIES: (Shaking head negatively) No.
> "THE COURT: You would not.
> "MS. CANDIES: (Shaking head negatively)
> "THE COURT: Then would you hang the jury?
> "MS. CANDIES: (Pause) No, I don't know.
> "THE COURT: Well, you have to be more exact. Would you or would you not?
> "MS. CANDIES: I think I would.
> "THE COURT: You would?
> "MS. CANDIES: Yeah.
>
> * * * *
>
> "MR. HAYES: Suppose the evidence were that 10 people killed a small child and there is no question about the evidence, are you saying you would not impose the death penalty in that case?
> "MS. CANDIES: Hmmm (pause) I don't know.
> "MR. HAYES: You would not?
> "MS. CANDIES: I am not sure.
> "MR. HAYES: You're not sure?
> "MS. CANDIES: I don't know." 1 TR at 48-50.

Such answers do not approach the "unambiguous" commitment to "automatically" vote against the death

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[14] The voir dire of the two jurors is set forth in full in Appendix E hereto.

[15] *Witherspoon* expressly held that prospective jurors may not be constitutionally excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522.

penalty required by *Witherspoon*. Ms. Candies' answers—"No, I don't know," "I think I would," "I am not sure," "I don't know"—portray a person who is frankly unsure whether she would or would not apply the death penalty, not one who is "irrevocably committed" to vote against it. This Court has consistently found the exclusion of veniremen with similar feelings to constitute a *Witherspoon* violation.[16]

Another prospective juror, Mary Revere, was excluded on the basis of the following exchange:

> "THE COURT: All right. Do you hold any conscientious scruples or religious beliefs against the imposition of the death penalty in the proper case?
>
> "MS. REVERE: I don't really believe in the death penalty.
>
> "THE COURT: Is that a religious belief or a conscientious scruple?
>
> "MS. REVERE: Just conscientious scruple.
>
> * * * *
>
> "THE COURT: Well, let me put it this way: The defendant is on trial for capital murder. That is a two-part trial. Sould the jury find him guilty of capital murder, you will hear the reputation, the good and bad, of the defendant, and then you would deliberate again, and if it warranted it, that you feel that the imposition of the death penalty was proper in this case, would you hang the jury?
>
> "MS. REVERE: *I would have to be absolutely positive.*

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[16] *Maxwell* v. *Bishop*, 398 U.S. 262, 264 (1970) ("I *think* I do") (emphasis supplied by the Court); *Funicello* v. *New Jersey*, 403 U.S. 948 (1971), *rev'g State* v. *Forcella*, 52 N.J. 263, 245 A.2d 181, 195-96 (1968); *Segura* v. *Patterson*, 403 U.S. 946 (1971), *rev'g* 402 F.2d 249 (10th Cir. 1968) ("I don't think I can bring in the death penalty"). *See also Granviel* v. *Estelle*, 655 F.2d 673, 677 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1644 (1982) ("No, I don't think I could [ever vote for the death penalty]").

"THE COURT: Assume for a moment that you are absolutely positive—and I'm not saying that you would be. You are absolutely positive. Under those circumstances, in order to, before you would surrender a conscientious scruple, you would hang the jury?

"MS. REVERE: Yes, sir.

"THE COURT: You would?

"MS. REVERE: Yes, sir.

"THE COURT: All right. I'm going to excuse her." 1 TR at 132-34. (Emphasis added.)

The trial court excused Ms. Revere on the basis of these statements, which were neither "unambiguous" nor demonstrative of an "automatic" or "irrevocable" commitment to vote against the death penalty.

The judge's use of the phrase "hang the jury" was probably confusing to a layman and it appears that Ms. Revere did not understand the questions using that phrase.[17] Such confusing questions, and the answers elicited, obviously cannot satisfy *Witherspoon's* requirement of "unmistakable clarity." "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." *Witherspoon*, 391 U.S. at 516 n.9.[18]

More importantly, Ms. Revere did not indicate that she would automatically vote against the death penalty. Her voir dire, taken as a whole, indicates that she was willing

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[17] After Ms. Revere had been excluded, both the prosecutor and defense counsel urged the judge not to make further use of the phrase "hang the jury" precisely because it was misleading and because, as defense counsel argued, "a layman may not understand" it. 1 TR at 134-36.

[18] *See Davis* v. *Georgia*, 429 U.S. 122, 124 (1976) ("the defect [was] a failure to question sufficiently"). In the case of venireman Revere, sufficient questions were not asked nor were sufficiently unambiguous answers obtained.

to "*consider*" the death penalty, which is "the most that can be demanded of a venireman in this regard." *Witherspoon*, 391 U.S. at 522 n.21.

The improper exclusion of even one venireman on grounds such as these precludes the imposition of the death penalty and requires summary reversal of the judgment below insofar as it upheld the death sentences. *Davis* v. *Georgia*, 429 U.S. 122 (1976).[19]

CONCLUSION

For the reasons stated herein, the writ of certiorari to the Virginia Supreme Court should be granted and the decision below reversed.

Respectfully submitted,

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March 9, 1983

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[19] The Court has summarily reversed even in cases where the claim was assertedly waived because it was not raised at trial. *Wigglesworth* v. *Ohio*, 403 U.S. 947 (1971); *Harris* v. *Texas*, 403 U.S. 947 (1971).

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 9th day of December, 1982.

Record No. 820753
Circuit Court No. F-81-487 (H.C.)

JAMES DYRAL BRILEY,
Appellant,

against

TERRELL DON HUTTO, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY (Director of the Department of Corrections, Substituted Respondent),
Appellee.

From the Circuit Court of the City of Richmond, Division I

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of opinion that the trial court did not err in applying the rule in *Hawks* v. *Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to appellant's allegations I, VII, VIII, IX and XI; the rule in *Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom Parrigan* v. *Paderick*, 419 U.S. 1108 (1975), to appellant's allegations, II, III, IV, V, VI, XV, XVI and XVII and by further finding that allegation III has been authoritatively decided by *Clark* v. *Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), and allegation VI has been authoritatively decided by *Whalen* v. *United States*, 445 U.S. 684 (1980), and *Harrison* v. *Commonwealth*, 220 Va. 188, 257 S.E.2d 777 (1979), and allegation XVI has been authoritatively decided by *In Re*

Kemmler, 136 U.S. 436 (1890), and *Martin* v. *Commonwealth*, 221 Va. 436, 271 S.E.2d 123 (1980), and allegation XVII has been addressed on appellant's direct appeal of the conviction, *Briley* v. *Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980); and by applying the mandate of Code § 8.01-654(B)(2) to allegations raised during the plenary hearing and not specified in the original petition or amended petition.

And the court is of the opinion there is no reversible error in the judgment dismissing appellant's allegations X, XII, XIII, XIX, XX and XXI upon a review of the record without taking additional evidence, *Arey* v. *Peyton*, 209 Va. 370, 164 S.E.2d 691 (1968); the court did not err in finding from the record that the rule in *Witherspoon* v. *Illinois*, 390 U.S. 510 (1968) had been complied with (See appellant's allegation IV).

And the court is of the further opinion that the trial court did not error in dismissing appellant's allegation XIV after a review of the record and the taking of evidence *ore tenus* and applying the rule in *Marzullo* v. *Maryland*. 61 F.2d 540 (4th Cir. 1977) *cert. denied* 435 U.S. 1011 (1978); the trial court did not err in dismissing appellant's allegation XVIII finding, from a review of the record and taking evidence *ore tenus*, that appellant was properly advised of his 5th and 6th amendment rights and thereafter with a full understanding, voluntarily and intelligently waived these rights and made a statement to police. *See*, *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Applying the mandate of Code § 8.01-654(B)(2) the court will not recognize and does hereby dismiss other complaints raised for the first time in appellant's petition for appeal.

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal.

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF RICHMOND
DIVISION I

F-81-487

JAMES DYRAL BRILEY, #101090,
Petitioner,

v.

TERRELL DON HUTTO, SUPERINTENDENT,
VIRGINIA STATE PENITENTIARY,
SPRING STREET, RICHMOND, VIRGINIA,
Respondent.

OPINION AND ORDER

This proceeding came on to be heard on December 22 and 28, 1981, upon the petition of James Dyral Briley for a writ of habeas corpus, the petitioner appearing in person and by his attorneys, Leonard B. Simon, Richard J. Wertheimer, James X. Dempsey and Gerald T. Zerkin, and the respondent appearing by Robert E. Bradenham, II, Assistant Attorney General. Whereupon this Court heard evidence and argument of counsel for petitioner and respondent, and after complete review of the transcripts and the records pertaining to the matters now before the Court, this Court is of the opinion that petitioner's allegations XIV (ineffectiveness of counsel) and XVIII (improper admission at trial of a statement made by petitioner the night of arrest), enumerated in petitioner's amended petition for a writ of habeas corpus, are without substantiation and merit for the reasons stated in this order and from the bench at the conclusion of the plenary hearing on December 28, 1981.

This Court further finds that petitioner's trial attorneys, Halford I. Hayes and Richard A. Turner, competently prepared and investigated petitioner's defense, and made tactical trial decisions, motions and objections, based on informed, professional deliberation in regard to these allegations. This Court finds that the petitioner was provided a fair and impartial trial and the representation afforded him by his trial attorneys was within the range of competence demanded of attorneys in criminal cases as enunciated in *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

This Court finds that the trial attorneys competently examined the jury veniremen for any prejudice and their attitudes on the death penalty and the selection procedure complied with the requirements for capital cases as enunciated in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

This Court also finds that petitioner's written statement to Detective Harding was voluntarily and intelligently made after he was properly advised of his constitutional rights and that, with full understanding, he voluntarily waived said rights.

Further, the allegations raised during the plenary hearing and not specified in the original petition or amended petition are denied because of petitioner's failure to comply with § 8.01-654(B)(2), Code of Virginia (1950), as amended.

It is further ADJUDGED and ORDERED that the record of the proceedings resulting in convictions on March 4, 1980, including all transcripts, be made a part of the record herein, and the petition for a writ of habeas corpus be, and is hereby, denied and dismissed as to the aforesaid allegations, to which action of this Court, petitioner's exceptions are noted.

Petitioner's remaining allegations raised in his amended petition for a writ of habeas corpus were previously dismissed by this Court in an Opinion and Order of October 29, 1981.

The Clerk is directed to forward a certified copy of this order to the petitioner, the respondent, Leonard B. Simon, Esquire, counsel for petitioner, and to Robert E. Bradenham, II, Assistant Attorney General.

Enter this 29 day of January, 1982.

_____

Judge

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF RICHMOND
DIVISION I

F-81-487

JAMES DYRAL BRILEY, #101090,
Petitioner,

v.

TERRELL DON HUTTO, SUPERINTENDENT,
VIRGINIA STATE PENITENTIARY,
SPRING STREET, RICHMOND, VIRGINIA,
Respondent.

OPINION AND ORDER

After argument of counsel on September 22, 1981, and mature consideration of the petition of James Dyral Briley for a writ of habeas corpus and the motion of the respondent and the authorities cited therein, this Court does find for the reasons stated in the Opinion letter of October 2, 1981 and the Motion to Dismiss of the respondent, which is adopted and incorporated into this order, that the petitioner is not entitled to the relief sought as to allegations I through XIII, XV through XVII, and XIX through XXI, enumerated in petitioner's amended petition for a writ of habeas corpus.

For the foregoing reasons, this Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed as to the aforesaid allegations. It is, therefore, ADJUDGED and ORDERED that the record and transcripts of the proceedings resulting in convictions on March 4, 1980, be made a part of the record herein, and the petition for a writ of habeas corpus be, and is hereby, denied and dismissed as to the aforesaid allegations, to which action of this Court, petitioner's exceptions are noted.

As to allegations XIV (ineffectiveness of counsel) and XVIII (improper admission at trial of a statement made by petitioner the night of arrest), this Court orders an evidentiary hearing to resolve these issues.

The Clerk is directed to forward a certified copy of this order to the petitioner, petitioner's attorneys, the respondent, and to Robert E. Bradenham, II, Assistant Attorney General.

Enter this 29 day of October, 1981.

CIRCUIT COURT OF THE CITY OF RICHMOND

JAMES M. LUMPKIN
Judge

John Marshall Courts Building
800 East Marshall Street
Richmond, Virginia 23219

October 2, 1981

Robert E. Brandenham, III, Esquire
Assistant Attorney General
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Richmond, Virginia 23219

Gerald T. Zerkin, Esquire
Ginter Professional Building
1001 West Brookland Park Boulevard
Richmond, Virginia 23220

Leondard B. Simon, Esquire
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: James Dyral Briley v. Edward C. Morris, Warden, Mecklenburg Correctional Center

Gentlemen:

The amended petition for writ of habeas corpus will be dismissed, except as regards the claims of (1) ineffectiveness of counsel and (2) improper admission at trial of a statement made by petitioner the night of arrest.

Petitioner cites twenty-one principal "Grounds of Illegality of Defendant's Death Sentence" in his amended petition. In the main, answers to each ground may be found in one or more of the following categories:

(1) trial transcript;

(2) raised on direct appeal to the Supreme Court of Virginia, or directly addressed in that Court's written opinion of November 26, 1980; or both;

(3) should have been raised at trial or on appeal and not here as a substitute for appeal or writ of error; or

(4) had been covered in prior decisions of the United States Supreme Court or the Supreme Court of Virginia.

Specifically, Grounds I, VII, VIII, IX and XI fall into the second category above; Grounds II through VI and XV through XVII fall into third and fourth categories. (see also, *James Briley* v. *Commonwealth*, 221 Va. 563, at 577; Grounds X, XII and XIII are answered in the trial transcript and shown therein to lack foundation. These are further addressed in *Turner* v. *Commonwealth*, 211 Va. at page 527, f.n. 12, and the James Briley appeal at page 577. As to Grounds number XIX, XX and XXI the court concurs with the statements and conclusions in motions to dismiss filed by the respondent and cases cited therein.

The discovery motions will be denied. Rule 4:1. Witnesses regarding the claim of ineffectiveness of counsel are not shown to be other than readily and equally available to either side. The same applies to alleged improper admission of petitioner's statement. *Rakes* v. *Fulcher*, 210 Va. 542.

The Attorney General should prepare and present an appropriate endorsed order and consult with petitioner's counsel as to an available date for the plenary hearing.

Very truly yours,

/s/ James M. Lumpkin
JAMES M. LUMPKIN

APPENDIX C

Virginia Death Penalty Statute

§ 19.2-264.2. Conditions for imposition of death sentence.—In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

§ 19.2-264.3. Procedure for trial by jury.—A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

§ 19.2-264.4. Sentence proceeding.—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death

is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any Rule of Court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history [1980 amendment, after petitioner's trial, substituted "prior history" for "past criminal record"] that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed.....foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed.....foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

§ 19.2-264.5. Post sentence reports.—When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

APPENDIX D

Sentencing Instructions at Petitioner's Trial

* * * *

THE COURT: Ladies and gentlemen of the jury, the Court will now instruct you as to the punishment aspect of the case. You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives: One, that, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing, serious threat to society; or, two, that his conduct in committing the offense was outrageous and wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder. If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you shall fix the punishment of the defendant at death; or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment. If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

You have, you have really found him guilty of two capital murders. This one instruction will take care of both capital murders. That's what you must find.

Then I give you the forms of your verdict, which read: We, the jury, on the issues joined, having found the defendant guilty of capital murder of Judy Diane Barton, the commission of robbery while armed with a deadly

weapon, and having found that, now you will have to scratch out what you do not find. In other words, you will use your pencil or pen and just scratch that out.

One, after consideration of his past criminal record, that there is a probability that he would commit criminal acts of violence that would constitute a continuing, serious threat to society and/or you can find both or one. His conduct in committing the offense is outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death; or, we, the jury, on the issues joined, having found the defendant guilty of capital murder of Judy Diane Barton during the commission of robbery while armed with a deadly weapon and having considered all the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life. In any event, your foreperson will find that verdict.

You will also have another verdict on Harvey Wayne Barton, which is, and won't cross out the same thing: We, the jury, on the issues joined, having found the defendant guilty of capital murder of Harvey Wayne Barton during the commission of robbery while armed with a deady weapon and having found that, then you must find one of these two things, or both. After consideration of his past criminal record, that there is a probability that he will commit criminal acts of violence that will constitute a continuing, serious threat to society or, and/or his conduct in committing the offense is outrageously or wantonly vile, horrible, or inhuman in that it involved torture, and that means depravity of mind, aggravated battery to the victim beyond a minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death; or, we, the jury, on

the issues joined, having found the defendant guilty of capital murder of Harvey Wayne Barton during the commission of robbery while armed with a deadly weapon and having considered all the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life. In any event, your foreperson will sign that verdict.

All right, gentlemen, do you wish to argue your case?

* * * *

APPENDIX E

Voir Dire of Prospective Jurors Candies and Revere

* * * *

THE COURT: All right, call the next one.

THE CLERK: Joyce Candies.

NOTE: At this point Ms. Candies was duly sworn by the Clerk.

THE COURT: All right, Miss Candies, the Court is going to ask you some questions. I will assume your answers are correct unless you indicate to the contrary.

These cases involve allegations against the defendant relative to the alleged crimes that took place on Barton Avenue on October 19th, 1979, and where the defendant stands charged with murder, rape, and robbery, and other matters. I will ask you some questions, and please make your answers loud and clear so we can understand them.

Do you hold any conscientious or religious belief against the imposition of the death penalty in the proper case?

MS. CANDIES: I don't believe in it (shaking head negatively).

THE COURT: You don't believe in it?

MS. CANDIES: (Shaking head negatively)

THE COURT: Is it a religious or just a conscientious belief?

MS. CANDIES: It's just my belief.

THE COURT: Just your belief?

MS. CANDIES: (Nodding head affirmatively) Uh-huh.

THE COURT: All right. In the event that it was a proper case, would your belief be so strong so as the jury verdict to be not unanimous?

MS. CANDIES: (Pause)

THE COURT: In other words, in any event, no matter what the evidence, you would not impose the death penalty?

MS. CANDIES: (Shaking head negatively) No.
THE COURT: You would not?
MS. CANDIES: (Shaking head negatively)
THE COURT: Then you would hang the jury?
MS. CANDIES: (Pause) No, I don't know.
THE COURT: Well, you have to be more exact. Would you or would you not?
MS. CANDIES: I think I would.
THE COURT: You would?
MS. CANDIES: Yeah.
THE COURT: Gentlemen, I'm going to excuse her for cause.
MR. HAYES: Your Honor, we would like the opportunity to ask her one or two questions before you do that.
THE COURT: Well, she's already said that, but you can ask her the questions. She's already said she could hang the jury. Go ahead and ask her.
MR. HAYES: All right, sir.
Miss Candies, are you saying that, under no circumstances, no matter what the evidence is, that you couldn't impose the death penalty?
MS. CANDIES: This is the way I feel right now.
MR. HAYES: Suppose the evidence were that ten people killed a small child and there's no question about the evidence, are you saying that you couldn't impose the death penalty in that case?
MS. CANDIES: Hmmm (pause), I don't know.
MR. HAYES: You could not?
MS. CANDIES: I'm not sure.
MR. HAYES: You're not sure?
MS. CANDIES: I don't know.
MR. HAYSE: In other words, if the evidence was so overwhelming, no matter what you know, it just stacked up high as the sky—
MS. CANDIES: Uh-huh.
MR. HAYES: —are you saying that even where that situation exists, you could not impose the death penalty?
MS. CANDIES: I don't think I could.

MR. HAYES: We have no objection, Your Honor.

THE COURT: All right, you may be excused.

NOTE: At this point, Ms. Candies was excused from the courtroom.

* * * *

THE CLERK: Mary Revere, No. 122.

NOTE: At this point Ms. Revere was duly sworn by the Clerk.

THE COURT: All right, have a seat, please, ma'am. I'm going to ask you some questions, and please make your answers loud enough so we can all hear you.

These crimes, alleged crimes, took place on October the 19th, 1979, on Barton Avenue in the City of Richmond, Virginia. They entail murder, rape, and robbery, and other related felonies. James D. Briley is the defendant in this particular case.

Have you seen, heard, or read anything about either the facts on this case or any trial involving the alleged crimes on this case, or anything about James Briley being involved in the case?

MS. REVERE: No, sir.

THE COURT: All right. Have you heard any of these crimes discussed by any of your friends, relatives, or anything?

MS. REVERE: Just mentioned, not in any detail.

THE COURT: All right. Have you discussed them in any way?

MS. REVERE: No.

THE COURT: All right, based on your discussion, have you formed or do you have an opinion as to the guilt or innocence of the accused in these cases?

MS. REVERE: No.

THE COURT: All right. Is there any member of your family, immediate family, involved in law enforcement, such as a police officer?

MS. REVERE: No.

THE COURT: All right. I'm going to list some names, and listen carefully, now, and I would like to

know if you are acquainted with, were acquainted with, or are related by blood or marriage to any of the parties: Mr. Rice, Mr. Von Schuch, Mr. Hayes, Mr. Turner, James D. Briley, Judy Diane Barton, Harvey Wayne Barton, and Harvey W. Wilkerson.

MS. REVERE: No.

THE COURT: All right. Do you hold any conscientious scruples or religious beliefs against the imposition of the death penalty in the proper case?

MS. REVERE: I don't really believe in the death penalty.

THE COURT: Is that a religious belief or a conscientious scruple?

MS. REVERE: Just conscientious scruple.

THE COURT: All right. If the facts warrant it—I'm not talking about this case—but in a case where the facts warrant it—and that's what I mean by a proper case—would you automatically vote for a life sentence and hang the jury?

MS. REVERE: (Pause)

THE COURT: Well, let me put it this way: The defendant is on trial for capital murder. That is a two-part trial. Should the jury find him guilty of capital murder, you will hear the reputation, the good and bad, of the defendant, and then you would deliberate again, and if it warranted it, that you feel that the imposition of the death penalty was proper in this case, would you hang the jury?

MS. REVERE: I would have to be absolutely positive.

THE COURT: Assume for a moment that you are absolutely positive—and I'm not saying that you would be. You are absolutely positive. Under those circumstances, in order to, before you would surrender a conscientious scruple, you would hang the jury?

MS. REVERE: Yes, sir.

THE COURT: You would?

MS. REVERE: Yes, sir.

THE COURT: All right.

I'm going to excuse her.

MR. HAYES: May I ask her a question?

THE COURT: Yes, sir, but I'm going to excuse her.

MR. HAYES: Mrs. Revere, are you saying that no matter how bad or how gross a particular case was, that there is no way you could impose a death sentence?

MS. REVERE: Well, I say rather than the death sentence, I don't say turn him out, but punish him.

MR. HAYES: That's not what I asked you.

THE COURT: Well, she's answering the same way she answered me: She would hang the jury.

I'm going to excuse her, Mr. Hayes.

MR. HAYES: All right, sir.

NOTE: At this point Ms. Revere was excused from the courtroom.

* * * *

No. 82-1491

In The

Supreme Court of the United States

October Term 1982

JAMES DYRAL BRILEY,

Petitioner,

v.

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. Whether the Jury was properly instructed concerning aggravating and mitigating circumstances.

II. Whether a statement of the Petitioner was obtained by the police in violation of *Miranda*.

III. Whether Jurors were excluded from the Jury Panel in violation of *Witherspoon*.

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JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257 and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in Petition for Writ of Certiorari at 2.

STATEMENT OF THE CASE

The petitioner was convicted by a jury in the Circuit Court of the City of Richmond on January 25, 1980. He was convicted of first-degree murder, robbery, rape, two

charges of capital murder, and the use of a firearm in each of those felonies. On the non-capital felonies the jury imposed sentences totaling life plus sixty-five years. After a separate hearing, the jury returned verdicts imposing the death penalty in both of the capital murder cases. On March 4, 1980, the trial court affirmed the death sentences and entered judgment in accordance with the jury verdicts. All of the convictions were affirmed by the Supreme Court of Virginia on November 26, 1980. *Briley* v. *Commonwealth,* 221 Va. 563, 273 S.E.2d 57 (1980).

A petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of Virginia on March 5, 1981 was denied by that court after a hearing on March 13, 1981. The petitioner appealed to the United States Court of Appeals for the Fourth Circuit on March 16, 1981, and on the same date, filed a petition for a writ of habeas corpus in the Circuit Court of the City of Richmond. On March 17, 1981, the Court of Appeals stayed the petitioner's execution, and on April 23, 1981, remanded the case to the District Court with orders to retain jurisdiction and hold the matter in abeyance while petitioner pursued his state habeas corpus remedies.

After oral argument on respondent's motion to dismiss, the Circuit Court of the City of Richmond dismissed all but two of petitioner's habeas corpus claims on September 22, 1981. *See* Petition for Writ of Certiorari at App. B. An evidentiary hearing on the remaining claims was held on December 22 and 28, 1981. After that hearing the Circuit Court dismissed those claims. *Id.* On April 28, 1982, petitioner filed a petition for appeal in the Supreme Court of Virginia. The petition was refused on December 9, 1982. *See* Petition for Writ of Certiorari at App. A.

STATEMENT OF FACTS

At trial, the evidence of the prosecution demonstrated that the petitioner, his two brothers, Linwood and Anthony, and sixteen year old Duncan Meekins were involved in three murders which occurred at a residence in Richmond on October 19, 1979. Those four individuals went to the residence of Harvey Wilkerson to rob him. Once inside they subdued Wilkerson, his common-law wife, Judy Barton, and their five year old son. After the adults were bound with electrical tape, Judy Barton was raped and money was stolen from the premises. According to Meekins, before leaving the residence he shot and killed Wilkerson, and the petitioner shot and killed Judy Barton and the child. Tr. Vol. II at 52, 62-63, 66-68, 386-387, 407. The medical evidence revealed that all three of the victims died of gunshot wounds to the head, Judy Barton having been shot in the head four times. *Id.* at 10-12, 17, 20-23, 25-26.

REASONS FOR DENYING THE WRIT

I.

The Issues Concerning The Constitutionality Of The Jury Instructions On Aggravating And Mitigating Circumstances Are Not Properly Before This Court; The Jury Was Properly Instructed Regarding Aggravating And Mitigating Circumstances.

The petitioner contends that at the penalty phase of his trial the jury was not constitutionally instructed regarding aggravating and mitigating circumstances. The petitioner raised these issues in his petition for a writ of habeas corpus. In his subsequent petition for appeal to the Supreme Court of Virginia, however, petitioner raised these issues only in the context of an allegation that the Circuit Court had erred by dismissing these claims without a hearing. *See*

Assignments of Error from Petition for Appeal appended to this brief at App. A. Respondent asserts, therefore, that the claims are being raised in this Court in a completely different context than that in which they were raised in the Supreme Court of Virginia. Thus the issues are not properly before this Court. *Beck* v. *Washington*, 369 U.S. 541, 550 (1962); *Ferguson* v. *Georgia*, 365 U.S. 570, 572 (1961); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181 (1919); *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248 (1902).

As to the claim concerning the constitutionality of the jury instructions on aggravating circumstances, the petitioner concedes that the jury found that both aggravating circumstances had been established beyond a reasonable doubt. *See* Petition for Writ of Certiorari at 11, and App. C. Petitioner raised the issue of the adequacy of the jury instructions regarding aggravating circumstances in the petition for a writ of habeas corpus appeal, but he did so only in the context of an allegation concerning the "outrageously or wantonly vile. . ." aggravating circumstance. At no time in the original petition or the petition for appeal to the Supreme Court of Virginia did petitioner raise a claim challenging the adequacy of the jury instructions concerning the "future dangerousness" aggravating circumstance. Respondent asserts, therefore, that this latter claim is not properly before this Court. *Beck, supra; Godchaux, supra.*

Since the claim regarding the "future dangerousness" aggravating circumstance is not properly before this Court, even if, *arguendo,* the jury instruction regarding the "outrageously or wantonly vile. . ." aggravating circumstance were constitutionally inadequate, such error would be harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). This is so because the jury found the ex-

istence of both aggravating circumstances. *See Stromberg* v. *California,* 283 U.S. 359, 367-368 (1931).

The respondent submits, nevertheless, that the jury was constitutionally instructed concerning the "future dangerousness" aggravating circumstance. The "future dangerousness" standard is not unconstitutionally vague and does not require specific definition of its meaning. *Jurek* v. *Texas,* 428 U.S. 262, 274-275 (1976). *See also, Gregg* v. *Georgia,* 428 U.S. 153, 183 n.28 (1976).

The petitioner alleges that the jury instructions concerning the "outrageously and wantonly vile. . ." aggravating circumstance were inadequate because they were "virtually identical to those rejected in" *Godfrey* v. *Georgia,* 446 U.S. 420 (1980). On that basis, he claims that the Supreme Court of Virginia erred when it ruled in *Briley, supra* at 579-580; 67, that the jury need not be informed of the limiting construction which the Court has placed upon this statutory phrase. *See* Petition for Writ of Certiorari at 13. Petitioner concedes, however, that the "outrageously or wantonly vile. . ." standard is not unconstitutional on its face. *See Gregg, supra* at 201.

The respondent asserts that the facts of this case make it readily distinguishable from *Godfrey, supra.* In *Godfrey,* the Court did not decide that the jury instructions, which "quoted to the jury the statutory language of the. . .aggravating circumstance in its entirety," were *per se* unconstitutional. *See* 446 U.S. at 426. Nor did the Court decide that the jury must be informed of the limiting construction which has been placed upon the "outrageously or wantonly vile. . ." standard. *See Stanley* v. *Zant,* 697 F.2d 955, 971 (11th Cir. 1983). Rather, the Court ruled that, based upon the particular facts of that case, the Georgia Supreme Court had adopted such a broad and vague con-

struction of the aggravating circumstance that it violated the Eighth and Fourteenth Amendments. 446 U.S. at 423, 432.

The defendant in *Godfrey*, experiencing serious domestic problems with his wife and mother-in-law, went to a trailer where the two women were. He shot his wife in the head through a window and killed her instantly. He then entered the trailer and shot and killed his mother-in-law instantly. The accused then reported the crimes to the police, accepted full responsibility, and described his deeds as a "hideous crime." At trial he asserted the defense of temporary insanity. *See* 446 U.S. at 426.

This Court found that Godfrey's crimes did not indicate that, for purposes of imposing the death penalty, he was any more "depraved" than any other murderer. The Court emphasized the evidence of "extreme emotional trauma," and the fact that Godfrey acknowledged his responsibility for the crimes almost immediately. *Id.* at 433.

In marked contrast to the facts in *Godfrey*, the facts in petitioner's case reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.* The evidence demonstrated that during the commission of robbery and rape, the petitioner executed a five year old boy and his mother by shooting them in the head. The mother was shot in the head four times and her skull was almost broken in half. Tr. Vol. II at 20-21.

The accused in *Godfrey* was emotionally distraught and he killed his victims instantly and without warning. Petitioner, however, killed his victims in a cool, calculated manner, and only after they were forced to wait for what they must have known was certain death. *See Briley, supra* at 579; 67. The woman was raped before she was killed, and the child was forced to witness the murder of both his

parents. The accused in *Godfrey* notified the police and accepted responsibility for his crimes. The petitioner, on the other hand, fled from the scene with his accomplices carrying the proceeds of the robbery.

Respondent asserts that the facts of this case amply demonstrate that the Supreme Court of Virginia has not adopted an unconstitutionally broad or vague construction of the "outrageously or wantonly vile. . ." standard. Therefore, petitioner's claim is without merit.

Petitioner's claim concerning the alleged inadequacy of the jury instructions on mitigating circumstances was not raised at trial or on direct appeal. Petitioner did raise the claim in his petition for a writ of habeas corpus, but the Circuit Court denied relief on the grounds that the claim could have been raised at trial and on appeal. *See* Petition for Writ of Certiorari at App. B. In refusing the petition for appeal, the Supreme Court of Virginia specifically stated that the Circuit Court had not erred by applying the procedural default rule. *See* Petition for Writ of Certiorari at App. A. *See also, Slayton* v. *Parrigan,* 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom Parrigan* v. *Paderick,* 419 U.S. 1108 (1975).

Respondent asserts that this claim is not properly before this Court. *Beck, supra; Godchaux, supra.* A state procedural rule which prohibits the raising of federal claims at late stages in a case is a valid exercise of state power. *See Wainwright* v. *Sykes,* 433 U.S. 72 (1977); *Williams* v. *Georgia,* 349 U.S. 375, 382-383 (1955). *See also, Henry* v. *Mississippi,* 397 U.S. 443, 446 (1965).

As to the merits of this claim, petitioner's reliance upon *Lockett* v. *Ohio,* 438 U.S. 586 (1978), is misplaced. In *Lockett,* this Court declared unconstitutional a state statute which severely restricted the number and type of mitigating

circumstances which could be considered by the sentencing authority in a death penalty case. The Court stated, "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." 438 U.S. at 608. *See also, Eddings* v. *Oklahoma,* ___ U.S. ___, 71 L.Ed.2d 1 (1982).

In the present case, the petitioner does not, and could not reasonably contend that Virginia's death penalty statute in any way restricts the consideration of mitigating factors by the jury. The relevant statute reads: "Facts in mitigation may include, *but shall not be limited to,* the following: [i through v]." *See* 19.2-264.4(B), Code of Virginia, set forth in Petition for Writ of Certiorari at App. C. (Emphasis added.) Thus the Virginia statute permits the jury to consider any evidence proffered by the defendant in mitigation, and clearly meets the requirements of *Lockett, supra.*

The petitioner's reliance on *Gregg* v. *Georgia,* 428 U.S. 153 (1976), is also misplaced. In *Eddings, supra* at 9, the Court discussed the statute involved in *Gregg* as it related to the issue of mitigating circumstances. The Court stated:

> By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances," the Georgia statute properly confined and directed the jury's attention to the circumstances of the particular crime and to the characteristics of the person who committed the crime. . . ." (*quoting* 428 U.S. at 197).

Thus, contrary to petitioner's assertion, *Gregg* does not require that the mitigating evidence which may be considered by the jury be defined or explained. To the contrary, any effort to delineate mitigating factors for the jury could run afoul of *Lockett, supra.* If the Constitution requires

that the jury not be precluded from considering *any* evidence in mitigation, there can be no constitutional requirement to inform the jury of the specific types of mitigating evidence which may be considered.

The Virginia death penalty sentencing procedures, like those of Georgia considered by the Court in *Gregg*, permit the jury to consider any evidence in mitigation of the offense, and require that the jury must find and identify at least one statutory aggravating circumstance before it can impose the death penalty. "In this way the jury's discretion is channeled" in a constitutionally acceptable manner. 428 U.S. at 206.

In the present case, petitioner was not restricted in any way from presenting mitigating evidence to the jury, and what mitigating evidence there was, was presented. Habeas Transcript (hereinafter cited as H.Tr.) at 92-93. The trial court correctly instructed the jury that before it could impose the death penalty it was required to find that the prosecution had established beyond a reasonable doubt at least one of the two statutory aggravating circumstances. *See* instructions from sentencing phase set forth in Petition for Writ of Certiorari at App. D. The trial court also correctly instructed the jury that, even if one or both of the aggravating factors had been established beyond a reasonable doubt, the jury should fix the punishment at life imprisonment if it believed "from all the evidence that the death penalty is not justified. . . ." *Id.* After the jury was so instructed, counsel for petitioner were permitted to argue to the jury at length that because of the mitigating evidence it should impose a sentence of life imprisonment rather than death. Tr. Vol. III at 136-144. Furthermore, the verdicts returned by the jury affirmatively stated that before fixing the petitioner's punishment at death, the jury

had found that both statutory aggravating circumstances had been established and that the jury had "considered the evidence in mitigation of the offense. . . ." *Id.* at 147-148.

After the verdicts, the trial court directed a probation officer "to thoroughly investigate. . . the history of the defendant and any and all other relevant facts [so that the court would be] fully advised as to whether the sentence of death is appropriate and just." *See* § 19.2-264.5, Code of Virginia, set forth in Petition for Writ of Certiorari at App. C. After receiving and reviewing the probation officer's report, the trial court affirmed the jury's verdicts. Tr. March 4, 1980 at 20-21. On appeal, the Supreme Court of Virginia, following the mandates of § 17-110.1(C), Code of Virginia, reviewed the death sentences and found that they had not been "imposed under the influences of passion, prejudice, or any other arbitrary factor," and were not "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Briley, supra* at 580-581; 68-69. This type of review "affords additional assurance" that the death sentences were imposed upon petitioner with due regard for all the mitigating evidence. *See Gregg, supra* at 207.

Respondent submits that in view of the statutory sentencing procedures that were employed in this case, and the instructions that were given to the jury on the issue of punishment, it is clear that the sentences of death were imposed upon petitioner in a constitutional manner.

II.
Petitioner's Constitutional Rights Were Not Violated By The Police And His Written Statement Was Properly Admitted Into Evidence.

In his petition for a writ of habeas corpus, the petitioner alleged that the trial court improperly admitted into evidence a handwritten statement given by the petitioner to the police on the night of his arrest. Petitioner did not object to the admission of the statement at trial or on direct appeal. The substance of the statement set forth an alibi defense and did not implicate the petitioner in the offenses of which the petitioner was accused. Tr. Vol. II at 244. According to petitioner's trial counsel, the defense did not object to the admission of the statement because it allowed the defense to introduce evidence of alibi, albeit uncorroborated, without the petitioner testifying and being subject to cross-examination and impeachment on the basis of his prior felony convictions. H.Tr. at 361-362, 581-582.

Despite the fact that this issue had not been raised at trial or on direct appeal, the Circuit Court of the City of Richmond conducted on evidentiary hearing to resolve the merits of the claim. On the basis of the evidence adduced at that hearing, the Circuit Court found that the petitioner had been properly advised of his constitutional rights and that he had voluntarily and intelligently waived those rights before he made his written statement to the police. *See* Petition for Writ of Certiorari at App. B. In refusing a petition for appeal, the Supreme Court of Virginia affirmed the ruling of the Circuit Court. *See* Petition for Writ of Certiorari at App. A.

Petitioner contends that the facts adduced at the evidentiary hearing demonstrate that his constitutional rights as set forth in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and

Edwards v. *Arizona*, 451 U.S. 477 (1981), were violated by the police, and that therefore the written statement was improperly admitted into evidence by the trial court. Petitioner focuses upon his own testimony at the evidentiary hearing that immediately after being arrested and advised of his constitutional rights he invoked his right to counsel. Petitioner alleges that both the Circuit Court and the Supreme Court of Virginia "ignored petitioner's request for an attorney, thereby fundamentally missing the point of *Edwards*. . . ." *See* Petition for Writ of Certiorari at 18.

Although the petitioner testified at the evidentiary hearing that after his arrest he requested an attorney, that testimony was completely contradicted by the testimony of the police officers involved in petitioner's arrest and interrogation. The police officers testified that at no time during the arrest or interrogation did petitioner invoke his right to counsel or his right to remain silent. H.Tr. 61, 67-70, 666, 669-670, 673-677. Petitioner's testimony was also significantly impeached by that of his trial attorneys who testified that at no time during the preparation for trial or during the trial itself did the petitioner tell them that he had invoked his right to counsel before making his written statement to the police. H.Tr. 148, 434-435. Although the evidence indicated that after his arrest the petitioner was permitted to make a telephone call and that he called an attorney, there was no evidence that the police knew or should have known whom the petitioner called. H.Tr. 66.

In resolving the conflicts in the testimony, the Circuit Court, as the trier of fact, resolved all issues of credibility adversely to the petitioner. The court stated:

> As to the claim under *Miranda*, the word that first comes to mind is contrived, contrived by this defendant for this hearing. The Court specifically rejects the testi-

> mony of the defendant and accepts the testimony of [the police officers] and the others who testified contrary to the defendant's statements in that regard. (H.Tr. 760.)

The issue of the credibility of the witnesses is one that is properly resolved by the trier of fact. *See Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979). Since the Circuit Court, as the trier of fact, decided the credibility issue adversely to the petitioner, this Court, like the Supreme Court of Virginia, must reject the petitioner's claim that he invoked his right to counsel before making his written statement to the police. *See Marshall* v. *Lonberger,* ____ U.S. ____ (decided February 22, 1983); *Sumner* v. *Mata,* 449 U.S. 539 (1981). When the evidence is viewed in this light, *Edwards, supra,* which involved continued police questioning after the accused asserted his right to counsel, is clearly inapposite.

The testimony of the police officers, which was expressly accepted by the trier of fact, was certainly sufficient to support the finding that petitioner's written statement was obtained in full compliance with *Miranda, supra.* Furthermore, the petitioner himself admitted that he was fully advised of his *Miranda* rights, that he fully understood those rights, including the right to counsel, that he had considerable previous experience with the criminal justice system, and that he wrote the statement in his own handwriting after signing a written waiver form. H.Tr. 78-81. *See* copy of waiver form appended to this brief at App. B. Under these circumstances, any rational trier of fact could have made the finding that the petitioner's constitutional rights were not violated by the police and that his written statement was therefore admissible. *Jackson, supra.*

Respondent asserts in the alternative that, since the written statement did not implicate the petitioner in the offenses

of which he was accused, and since petitioner was convicted primarily upon the independent testimony of an accomplice, Duncan Meekins, if any error was committed in the admission of the written statement, it was harmless beyond a reasonable doubt. *Chapman, supra.* See *Milton* v. *Wainwright,* 407 U.S. 371 (1972).

III.

The Issue Of Alleged Improper Juror Exclusion Is Not Properly Before This Court; Jurors Candies And Revere Were Properly Excluded From The Jury Panel.

As petitioner concedes, the claim that two jurors were improperly excluded from the jury panel was not raised at trial or on direct appeal. *See* Petition for Writ of Certiorari at 5. The claim was raised in the petition for a writ of habeas corpus filed in the Circuit Court, and that court dismissed the claim both on the merits and because it should have been raised at trial and on appeal. *See* Petition for Writ of Certiorari at App. B.

In the petition for appeal to the Supreme Court of Virginia, however, the claim was raised solely in the context of an allegation that the Circuit Court erred by dismissing the claim without a hearing. *See* Assignments of Error from Petition for Appeal appended to this brief at App. A. When the Supreme Court of Virginia refused the petition for appeal, it stated that "the court did not err in finding *from the record* that the rule in *Witherspoon* v. *Illinois,* . . . had been complied with. . . ." *See* Petition for Writ of Certiorari at App. A. (Emphasis added.) By ruling that the Circuit Court did not err by making the finding "from the record," the Court, in effect, ruled that the Circuit Court did not err by refusing to conduct a hearing on this claim.

Petitioner has asked this Court to decide the merits of the claim even though the Supreme Court of Virginia was only asked to decide whether the Circuit Court had erred by refusing to conduct a hearing on the claim. For this reason, respondent asserts that the claim is not properly before this Court. It is a jurisdictional requirement that the federal question which this Court is asked to consider must have been presented to the state's highest court. *Beck* v. *Washington*, 369 U.S. 541, 550 (1962); *Ferguson* v. *Georgia*, 365 U.S. 570, 572 (1961); *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181 (1919); *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248 (1902).

As to the merits of the claim, petitioner contends that the *voir dire* of jurors Candies and Revere does not demonstate the degree of opposition to the imposition of the death penalty required for exclusion under *Witherspoon* v. *Illinois*, 391 U.S. 510 (1967). Witherspoon prohibits the exclusion of venireman "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. A prospective juror may be excluded, however, if he is "irrevocably committed...to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Id.* at n. 21.

A review of the entire *voir dire* of jurors Candies and Revere reveals that they were properly excluded for cause under the *Witherspoon* standard. *See* Petition for Writ of Certiorari at App. E. During *voir dire* the following exchange occurred between the trial judge and juror Candies:

> THE COURT: In other words, in any event, no matter what the evidence, you would not impose the death penalty?

MS. CANDIES: (Shaking head negatively) No.
THE COURT: You would not?
MS. CANDIES: (Shaking head negatively)

(Tr. Vol. I at 48-49.)

When asked by defense counsel if she meant "that, under no circumstances, no matter what the evidence is, that you couldn't impose the death penalty?" Candies responded, "This is the way I feel right now." Tr. Vol.I at 49. Even when defense counsel cited an extremely aggravated example, and asked Ms. Candies if she could not impose the death penalty even if the evidence was "so overwhelming" and "stacked up high as the sky," she responded, "I don't think I could."

During the *voir dire* of juror Revere, after she had indicated to the trial judge that her opposition to the death penalty would cause her to "hang the jury" rather than vote to impose the death penalty (Tr. Vol.I at 133), the following exchange occurred between defense counsel and the prospective juror:

MR. HAYES: Mrs. Revere, are you saying that no matter how bad or how gross a particular case was, that there is no way you could impose a death sentence?
MS. REVERE: Well, I say rather than the death sentence, I don't say turn him out, but punish him.

(Tr. Vol.I at 134.)

Respondent asserts that the record amply demonstrates that Candies and Revere were excluded for cause only after they made it "unmistakably clear" that they would not vote to impose the death penalty under any circumstances. *Witherspoon, supra* at 522 n.21. *See also, Boulden* v. *Holman,* 394 U.S. 478, 482 n.6 (1969). For this reason, peti-

tioner's claim that the jurors were improperly excluded from the jury panel is without merit.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacqueline G. Epps, Senior Assistant Attorney General of Virginia, Counsel of Record for the Respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 13th day of April, 1983, three copies of the foregoing Brief in Opposition to the grant of a Writ of Certiorari were mailed, first-class postage prepaid, to Richard J. Wertheimer, Arnold & Porter, 1200 New Hampshire Avenue, N.W., Washington, D.C. 20036, Counsel of Record for Petitioner.

JACQUELINE G. EPPS
Senior Assistant Attorney General

APPENDIX A

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. .....

JAMES DYRAL BRILEY,

Petitioner,

v.

DIRECTOR OF THE DEPARTMENT
OF CORRECTIONS,

Respondent.

PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR

1. The Court erred in ruling that the trial judge had properly admitted a statement obtained from the petitioner on the night of his arrest after he had requested the presence of an attorney.

2. The Court erred in ruling that petitioner was afforded effective assistance of counsel despite numerous serious errors and omissions by his trial counsel.

3. The Court erred in dismissing petitioner's other claims without a hearing. The Court erred (a) in ruling that petitioner had waived certain claims which trial counsel, through error and omission, failed to raise at trial or on direct appeal; and (b) in failing to reconsider the constitutionality of the death penalty and other issues raised on direct appeal.

APPENDIX B

BUREAU OF POLICE
RICHMOND, VIRGINIA

Date: 10-22-79
Time: 1145 2345

Name of Accused: James Dyral Briley

I am Detective Sgt. N. A. Harding of the Richmond, Virginia, Bureau of Police.

1. You are being interviewed in connection with the alleged commission of the crime of murders of Harvey Wilkerson, Jr., Dianne Barton & Harvey Barton. 3 Firearms charges . .

2. You have an absolute right to remain silent and make no statement to me and your silence will be guarded by the police.

3. Any statement you make without counsel can be used as evidence against you.

4. You have a right to the presence of an attorney during this or any future interview the police might have with you. The attorney may be one of your own choosing which you retain, or if you are without funds to employ counsel, the court will appoint one for you.

Do you understand the rights that have been explained to you? Yes J.B.

You may voluntarily waive the above rights that have been explained to you and make a statement if you so desire.

James Briley
Signature of Accused

No. 82-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES DYRAL BRILEY,
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v.

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court for the Commonwealth of Virginia

---

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. This Court Should Grant Certiorari to Clarify the Extent to Which Instructions Are Necessary in a Capital Case to Guide and Channel the Discretion of the Jury

The Commonwealth's brief confirms the need for guidance from this Court on the question of whether sentencing instructions which merely repeat the bare words of the aggravating circumstances provision in a death penalty statute—but omit the mitigating circumstances provisions—are sufficient to channel the discretion of the jury in a capital case.

The Commonwealth contends that a mere reading of some portions of the statute, with only passing reference to mitigation, suffices. Petitioner submits that *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980), requires a state to do more, and not only "tailor [but also] *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (Emphasis added.)

Respondent relies in part on *Jurek* v. *Texas*, 428 U.S. 262 (1976). (Brief in Opp. at 5.) But *Jurek* related to the *facial* validity of a Texas death penalty statute and did not even address the question of the instructions necessary for constitutional application of such a statute. As we demonstrate in the Petition, the instructions question is currently the subject of considerable confusion in the state supreme courts and the lower federal courts, (Petition at 7-10),[1] and deserves this Court's clarification.

The Commonwealth, in arguing that instructions are unnecessary, goes so far as to claim that any instruction on mitigating circumstances could "run afoul" of *Lockett* v. *Ohio*, 438 U.S. 586 (1978). (Brief in Opp. at 8.) The Commonwealth's reliance on *Lockett* is ironic; *Lockett* held that a jury's consideration of mitigating factors could not be limited, but the trial court in this case never even told the jury that it was obliged to consider mitigating factors.

The Commonwealth quotes that portion of the Virginia death statute which states that "Facts in mitigation may include, *but shall not be limited to*, the following . . . ." (emphasis supplied by respondent) and contends that this provision "permits the jury to consider any evidence proffered by the defendant in mitigation, and clearly meets the requirements of *Lockett*." (Brief in Opp. at 8.) But *this provision was never read to the jury*. Nor was

---

[1] *See also Balkcom* v. *Goodwin*, No. 82-1409, *cert. denied*, 51 U.S.L.W. 3750 (April 19, 1983) (ruling below: instructions that do not clearly guide jury in its understanding of mitigating circumstances and option to recommend life sentence violate U.S. Constitution).

the jury ever told that its consideration of mitigating evidence was to be unlimited. The jury was not even told what might constitute mitigating evidence.

Certiorari should be granted so that the Court might clarify what the jury must be told concerning aggravation and mitigation in a death penalty case.

II. Petitioner's Claims Were Preserved in the Virginia Supreme Court and Are Properly Before this Court

Every one of the claims raised in this petition was raised in the state habeas corpus proceeding and appealed to the Virginia Supreme Court.[2] With respect to the inadequacy of the trial court's instructions on the application of the Virginia death penalty statute, and the *Witherspoon* claim, petitioner's Petition for Appeal to the Virginia Supreme Court stated (at 43): "These claims deserved the full attention of the Circuit Court *and should be heard on appeal by this Court.*" (Emphasis added.)

Respondent's reliance upon *Beck* v. *Washington*, 369 U.S. 541 (1962), *Ferguson* v. *Georgia*, 356 U.S. 570 (1961), and *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238 (1902), is misplaced, since these cases dealt with claims which had not been raised at all in the state trial court or the state supreme court. *Godchaux Co.* v. *Estopinal*, 251 U.S. 179 (1919), is equally inapposite, for in that case the claim had not been raised at trial and

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[2] With respect to the instructions question, the habeas corpus petition alleged:

> "The trial court failed adequately to instruct the jury concerning the aggravating and mitigating circumstances, as a result of which the jury's discretion was unchanneled and the imposition of the death sentence by such an uninstructed and unguided jury constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, § 9 of the Constitution of Virginia." (Amended Habeas Petition at 17.)

was raised below for the first time in an application for rehearing to the state supreme court.

III. The Undisputed Facts Present a Clear *Miranda* Violation

Petitioner's *Miranda* claim is based upon two facts, neither of which the Commonwealth disputes. *First*, petitioner requested an attorney on the night of his arrest. *Second*, the police continued to question petitioner after he had requested an attorney.

Petitioner's *Miranda* claim is not based upon any challenged testimony, or upon the credibility of any witness. This claim merits summary reversal for the reasons previously stated.[3]

* * * *

For the reasons set forth above and in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[3] It must be noted that the habeas court and the Virginia Supreme Court did not base their ruling on the credibility of the testimony. Rather, they based their rulings on a finding of a knowing and voluntary waiver. (*See* Petition at 18.)